

**CODE OF CONDUCT
CONSULTATION PAPER**

EH Consents

March 2020



Australian
Carbon Industry
Code of Conduct



1. Background

Commencing on 1 July 2018, the Australian Carbon Industry Code of Conduct (the Code) aims to:

- 1) define industry best practice for project developers, agents, aggregators and advisers in Australia's carbon projects industry;
- 2) promote consumer protection and appropriate and open interaction with project owners and landowners;
- 3) provide guidance to scheme participants; and
- 4) promote market integrity, accountability and display international leadership in carbon project development.

In 2020, an Independent Review of the Australian Carbon Industry Code of Conduct was undertaken, from which 46 recommendations to the Code Administrator were made. As part of the Code's operational transition, the Administrator is proposing updates to the Code text and related frameworks and will consult with stakeholders on these changes early in 2021. During consultations, the Administrator will welcome feedback on any/all potential options and will use these reflections to form a final position that will be announced in May 2021. Relevant changes will be incorporated into updated Code text and guidance materials (Appendix 1) to be shared with stakeholders well in advance of coming into effect on 1 July 2021.

This consultation paper has been developed to address recommendations 2-4, which relate to:

- Best practice obtainment of eligible interest holder (EIH) consent (Code Section 2.2);
- Reporting of compliance with relation to the above (Code Section 2.2 and 3.10);
- Consideration of 'active dissent' of EIHs (Code Section 2.2).

Each recommendation is outlined below, along with the Administrator's initial response communicated to stakeholders in 2020. These below responses underpin the approach to proposed changes laid out later in this consultation paper.

Independent Review Recommendations 2 3 4	
Review Recommendation	Administrator's 2020 Review Response
2. It is recommended that the Code clarify in section 2.2(3)(d) ¹ that best-practice requires EIH consent to be obtained prior to the registration of area-based ERF projects, consistent with the guidance of Indigenous Carbon Industry Network (ICIN) for "seeking free, prior and informed consent from Indigenous communities for carbon projects" – a best practice guide for carbon project developers.	Approved The Administrator accepts that the ICIN guidance represents best practice and will continue to engage with a range of stakeholders regarding the application of this guidance in EIH processes. See Recommendation 3 (below).
3. The Review recommends the above best-practice standard on an 'if not, why not' basis. It is recommended that Signatories be obliged to report against the best-practice standard on the 'if not, why not' basis in their 'Annual Report (Self-Audit Checklist)'.	Approved In-Principle In the context of Recommendation 2, acknowledging what is best practice, the Code Administrator will use this transitional year to work with Signatories and Indigenous

¹ Note that the Independent Review published by the Administrator on the Code of Conduct website erroneously states that this is 2.3(3)(d).



<p>The ‘if not, why not’ approach requires a Signatory to report the reasons why they did not achieve the Code’s best-practice standard. The Signatory should report the strategy adopted to obtain consents from EIHS and the reasons why consent could not be obtained prior to project registration. The Code Administrator could then assess whether the Signatory’s approach was credible and consistent with the Code’s ‘open and appropriate interaction’ objective and the community trust principle. In addition, it would provide demand-side participants with a cue for a meaningful dialogue about EIH consent.</p>	<p>stakeholders on appropriate transparency and accountability of Signatory behaviour.</p>
<p>4. It is recommended that Signatories consider the financial and cultural advantages of taking into account the ‘active dissent’ of EIHS in relation to area-based ERF projects.</p>	<p>Approved In-Principle</p> <p>As above, the Administrator agrees in-principle with this recommendation and will consider the best options for implementation throughout the initial 12-month transition period of the Operational Stage.</p>

2. Consideration of Recommendations 2 | 3 | 4

The Code Administrator provided a response to each recommendation following a consultation on the review recommendations which received 8 submissions.

Submissions made to the Independent Review by Signatories and stakeholders in May and June 2020 revealed support for Recommendations 2-4, noting some issues and considerations, as below:

- **Recommendation 2:** Submissions expressed both support and concern for this recommendation, highlighting the tension between the recommended requirements for seeking consent from EIHS and the practicalities of these recommendations. There are contrasting perspectives on the level of flexibility of the Administrator’s approach to this. Other suggestions from submissions included: requiring consent to be obtained prior to project application; applying more stringent obligations on consent from registered Native Title claimants; requiring the implementation of Indigenous Land Use Agreements (ILUAs) prior to project registration; ensuring that Code requirements relating to consents are fully understood by Signatories; and engagement of ICIN and its members in the development of communication materials to ensure that these materials are accessible to Indigenous audiences.
- **Recommendation 3:** Submissions expressed both support and concern for this recommendation. Concerns related specifically to: the potential burden to the Administrator and Signatories, and the perceived impracticality of such a reporting arrangement; whether Code language around “reasonable efforts” is sufficient to ensure best practice. Other suggestions included: applying more stringent obligations with relation to Native Title EIH consents as opposed to other EIHS; consideration of backdating project baselines which would reduce the burden associated with seeking consents.



- Recommendation 4: Submissions expressed both support and concern for this recommendation. One submission specifically highlighted the potential for adverse consequences of ‘active dissent’ considerations if some scheme participants serve to hinder potential future projects; another suggested an approach whereby the CER would unilaterally revoke projects that have been subject to active dissent from EIHS.

The view of the Administrator is that:

- The ICIN guidance represents best practice with Indigenous clients and stakeholders, and that the Code should urge, if not require, Signatories to be aligned with this guidance for seeking consent from Native Title Holders and registered Native Title claimants;
- The Code should require Signatories to follow the ‘comply or explain’ approach to reporting on their EIH consents practices;
- In following a ‘comply or explain’ approach to consent practices, the Code Administrator should provide clarity on the implications of non-compliance, particularly how such explanations would be considered and assessed; and
- Signatories should consider the financial and cultural advantages of taking into account the ‘active dissent’ of EIHS, but that further consideration needs to be applied to the potential implications of this.

The Administrator’s position is based on the alignment of these recommendations with the purposes and objectives of the Code (Section 1.1). Recommendations 2-4 are expected to uplift the level of integrity, trust, accountability and transparency in the market, while providing Signatories the option to explain any instances where compliance was not achievable.

3. Proposed Options for Consultation

3.1 Alignment with ICIN Guidance

Recommendation 2 suggests that the Code clarify in section 2.3(3)(d) that best-practice requires EIH consent to be obtained prior to the registration of area-based ERF projects, consistent with the guidance of Indigenous Carbon Industry Network (ICIN) for *‘Seeking free, prior and informed consent from Indigenous communities for carbon projects.’*

The Independent Review also highlights that this is an issue of concern, and there is a range of views in the industry regarding the ability to seek or obtain all relevant consents prior to project registration.

The Administrator also proposes the follow amendments to Code text (changes in red) to better reflect the best practice standards set out in ICIN’s guidance.

Current Text	Proposed Text
<p>2.2(3)(d)</p> <p>Where an area based project occurs on native title land, the Signatory must follow the best practices set out in the ‘Native title, legal right and eligible interest-holder consent guidance’ published by the Regulator (available on the Regulator’s website) and must undertake due diligence to ensure that:</p>	<p>2.2(3)(d)</p> <p>Where an area based project occurs on native title land, the Signatory must follow the best practices set out in the ‘Seeking free, prior and informed consent from Indigenous communities for carbon projects’ guidance published by the Indigenous Carbon Industry Network (ICIN)², and must have regard to the ‘Native title, legal</p>

²Available online [here](#)



<p>(i) Native Title Holders are advised of the intention to register a project over native title land;</p> <p>(ii) Native Title Holders are provided with guidance on project registration and implementation, including, but not limited to:</p> <p>(A) The information set out in Clauses 2.2(5) – 2.2(8), 2.2(10), 2.2(11) and 2.3(2), as relevant to the Native Title Holders’ interest in the project, whilst remaining compliant with confidentiality clauses in Carbon Abatement Contracts;</p> <p>(B) The existence of the Code and the complaints handling process; and</p> <p>(C) Any approvals that have been obtained or are required to be obtained from any government or regulatory authority;</p> <p>(iii) Genuine and early engagement with Native Title Holders has been undertaken to ensure all parties have a mutual understanding about project conditions and requirements;</p> <p>(iv) The Signatory understands and has taken reasonable steps to comply with the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples, including in particular the principle of free, prior and informed consent, when running a project on land subject to native title;</p> <p>(v) Reasonable efforts have been made to enter into legally binding agreements with Native Title Holders before project registration. Where agreement is unable to be reached, Native Title Holders have been consulted and have provided relevant forms of agreement to the registration of a project, as appropriate, including a process by which final consent will be obtained;</p> <p>(vi) Reasonable efforts have been made to consult with Native Title Holders with a claim and to obtain agreement, as appropriate, prior to the registration of a project;</p> <p>(vii) The requirements of the Native Title Act 1993 (Cth) have been complied with;</p> <p>(viii) Native Title Holders have provided consent to the ongoing operation of the project, prior to any ACCU issuance; and</p> <p>(ix) Reasonable efforts have been made to obtain consent from Native Title Holders with a claim prior to any ACCU issuance.</p>	<p>right and eligible interest-holder consent guidance’ published by the Regulator (available on the Regulator’s website). Signatories must undertake due diligence to ensure that:</p> <p>(i) Established channels within Indigenous communities are utilised to identify affected Indigenous people and organisations and the appropriate mechanisms for engagement;</p> <p>(ii) Native Title Holders are provided with guidance on project registration and implementation, including, but not limited to:</p> <p>(A) The information set out in Clauses 2.2(5) – 2.2(8), 2.2(10), 2.2(11), 2.2(12) and 2.3(2), as relevant to the Native Title Holders’ interest in the project, whilst remaining compliant with confidentiality clauses in Carbon Abatement Contracts;</p> <p>(B) The existence of the Code, the Code Administrator’s complaints handling process and the Signatory’s own complaints handling process; and</p> <p>(C) Any approvals that have been obtained or are required to be obtained from any government or regulatory authority;(iii) Genuine and early engagement with Native Title Holders (and where possible, registered Native Title claimants), has been undertaken in the mode of communication and language that is most appropriate for the relevant stakeholders, to ensure all parties have a mutual understanding of all project conditions and requirements;</p> <p>(iv) The Signatory understands and has taken reasonable steps to comply with the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples, including in particular the principle of free, prior and informed consent (FPIC), throughout the duration of the project when running a project on land subject to native title;</p> <p>(v) Reasonable efforts have been made to enter into legally binding agreements with Native Title Holders before the application to register the project is made. Where timely agreement is unable to be reached, Native Title Holders have been engaged with and have provided relevant forms of agreement to the registration of a project, as appropriate, including a process by which final consent will be sought;</p> <p>(vi) Reasonable efforts have been made to consult with registered Native Title Holders and potential claimants and to obtain agreement and written consent, as appropriate, prior to the application to register a project;</p> <p>(vii) The requirements of the Native Title Act 1993 (Cth) have been complied with;</p>
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	<p>(viii) Native Title Holders have provided consent to the ongoing operation of the project, prior to the application to register a project;</p> <p>(ix) Reasonable efforts have been made to consult with and obtain consent from registered Native Title claimants prior to the application to register a project;</p> <p>(x) Signatories must seek to ensure that they genuinely understand the relevant Indigenous stakeholders' perspectives and their priorities for the land or resource;</p> <p>(xi) Signatories must seek to ensure ongoing and dynamic engagement with Native Title Holders, Native Title Claimants and other relevant Indigenous stakeholders including through the planning, development and implementation phases of the project, applying the principles of FPIC throughout the life of the project; and</p> <p>(xii) Signatories must ensure that relevant Native Title Holders are fully informed about their rights to give or deny consent, as well as the costs, benefits, risks and any other implications of the relevant project, and have the opportunity to seek independent advice, prior to the application to register the project.</p> <p>(xiii) In meeting the requirements set out in (i) through (xii) above, Signatories must comply with section 2.3(5)(a) of the Code.</p>
<p>2.2(3)(e)</p> <p>(e) The requirements set out in (d)(i) through (vii) above occur prior to the registration of the project, and with reasonable time for Native Title Holders and Native Title Holders with a claim to reach an informed decision.</p>	<p>2.2(3)(e)</p> <p>[EITHER:]</p> <p>(e) Unless otherwise stated, the requirements set out in (d)(i) through (xii) above occur prior to the application to register a project, and with reasonable time for Native Title Holders and registered Native Title claimants to reach an informed decision.</p> <p>[OR:]</p> <p>[Remove clause 2.2(3)(e) as it is not necessary if the above amendments to 2.2(3)(d) are made]</p>
<p>2.2(3)(f)</p> <p>Signatories will ensure that consents from eligible interest holders are sought in a timely manner and in accordance with the requirements of the CFI Act.</p>	<p>[Remove clause 2.2(3)(f) as it is not necessary if the above amendments to 2.2(3)(d) are made]</p>
<p>2.3(4)(b)</p> <p>Records must be kept in a manner that are easily accessible for audit or other purposes including, but not limited to:</p> <p>[no mention of Indigenous stakeholders in this section]</p>	<p>2.3(4)(b)</p> <p>Records must be kept in a manner that are easily accessible for audit or other purposes including, but not limited to:</p> <p>[(i) through (xiii) remain the same]</p> <p>(ix) written records of engagement with Indigenous stakeholders and their representative bodies</p>



2.3(4)(c) [not currently in the Code]	2.3(4)(c) With respect to 2.3(4)(b)(ix) above, Signatories must provide copies of the written records to stakeholders involved in those consultations.
2.3(5)(d) [not currently in the Code]	2.3(5)(d) When engaging with Traditional Owners and their representative bodies, Signatories must consider cultural contexts, as outlined in the ICIN guidance, including but not limited to significant cultural events and 'sorry business' that may impact on timeframes for engaging and seeking consents.

3.2 'Comply or Explain' Reporting Requirements

Recommendation 3 is that the Code implement an 'if not, why not' (or 'comply or explain') approach to reporting on a Signatory's efforts to seek and obtain consent from EIHS.

Current Text	Proposed Text
[Additional clause to be inserted in Section 3.5]	<p>3.5(3) If a Signatory is not in compliance with any of the requirements set out in this Code of Conduct, the Signatory must report to the Administrator explaining why this is the case in the Code Administrator's annual reporting process.</p> <p>3.5(4) If a Signatory is not in compliance with any of the requirements set out in section 2.2(3), the Signatory must report to the Administrator explaining why this is the case at the time of application to register a project.</p> <p>3.5(5) Instances of non-compliance which have been accompanied by a formal explanation from the Signatory will be assessed by the Administrator and/or the Code Review Panel. Where relevant, Signatories may be found to be formally in breach of the Code and the relevant sanctions may be applied.</p>

3.3 Consideration of Active Dissent

Current Text	Proposed Text
[Additional clause to be inserted in Section 2.3(3)]	<p>2.2(3)(g) Signatories must consider the financial and cultural implications of taking into account the 'active dissent' of eligible interest holders in relation to area-based ERF projects.</p>



3.4 Administrator's Approach to Non-Compliance

In following a 'comply or explain' approach to consent practices, the Code Administrator will seek to provide clarity on the implications of non-compliance, particularly how such explanations would be considered and assessed. The Administrator welcomes Signatory and stakeholder feedback during consultation discussions on the following:

- The assessment of the instance of non-compliance, including key considerations (e.g. the extent of the impact on consumers and clients, acceptability of the non-compliance, treatment of instances of reoccurring non-compliance, etc).
- The governance framework of the comply or explain approach (e.g. the process for assessing severity of non-compliance against the Code's breach assessment matrix; and based on this assessment, whether it would be required to be referred to the Code Review Panel for review).
- The application of sanctions, where applicable, for such instances of non-compliance (e.g. informed by an updated breach matrix and/or review by Code Review Panel, determining whether the Signatory's explanation is sufficient or not).

Consultation Next Steps

The Administrator will:

1. Undertake consultations in April 2021 with the following groups of stakeholders, as relevant:
 - Indigenous stakeholders and Indigenous representative groups
 - Signatories
 - The Clean Energy Regulator
 - Government Partners of the Code
 - Industry Supporters of the Code
 - Prospective Signatories, Partners, and Supporters
 - Land management stakeholders and their representative groups
2. Use the information provided during the consultations to inform the Code's development as it is transitioned to fully operational from 1 July 2021.
3. Continue to inform stakeholders and Signatories of prospective amendments to the Code, and provide an electronic copy of the Code text with proposed changes clearly marked prior to the updates being enacted.
4. Invite stakeholders' final comments on the draft updates, which will be taken into account at the Administrator's discretion.

Stakeholders from any of the above groups are invited to contact the Code Administrator (code.administrator@carbonmarketinstitute.org) to confirm interest in participating in the consultations.

for more information please contact

Code Administrator

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